DEPARTMENT OF STATE REVENUE

04-20100513.SLOF

Supplemental Letter of Findings Number: 04-20100513
Use Tax
For Tax Years 2007-08

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ISSUES

I. Use Tax–Public Transportation; Manufacturing Exemption.

Authority: Letter of Findings 04-20100513 (November 16, 2010); IC § 6-2.5-5-27; Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003); 45 IAC 2.2-5-61(b); IC § 6-8.1-5-1(c); 45 IAC 2.2-5-8(c)(2)(E).

Taxpayer protests the imposition of use tax on hauling equipment and parts; Taxpayer also protests the imposition of use tax on crushed stone and rocks, which it believes are exempt.

II. Tax Administration–Negligence Penalty and Interest.

Authority: 45 IAC 15-3-2(d)(1); 45 IAC 15-11-2(c).

Taxpayer protests the imposition of a ten percent negligence penalty and the assessment of interest.

STATEMENT OF FACTS

Taxpayer operates a chip mill. Taxpayer's chip mill is "a stand-alone facility that converts pulpwood into chips." As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on all of its purchases which were subject to sales tax during the tax years 2007 and 2008. The Department issued proposed assessments for use tax, interest, and a ten percent negligence penalty. Taxpayer filed a protest; an administrative hearing was conducted and a Letter of Findings ("LOF") was issued. The LOF denied Taxpayer's protest. A rehearing was held and this Supplemental Letter of Findings results.

I. Use Tax–Public Transportation; Manufacturing Exemption.

DISCUSSION

Public Transportation:

The Department notes the following regarding Taxpayer's public transportation argument. At the rehearing, Taxpayer basically reiterated its earlier argument. For the sake of clarity the Department will once again address the issue. Taxpayer previously argued that it is entitled to an exemption for "hauling material [i.e., wood chips] that they do not own...." The Department, in Letter of Findings 04-20100513 (November 16, 2010), denied Taxpayer's argument. In that LOF the Department noted that the "Lease Agreement" stated in relevant part "That said all timber that is purchased is free of all liens and/or mortgages." The LOF stated:

> The Department finds that Taxpayer acquired the chips, and thus Taxpayer is not entitled to the public transportation exemption found in IC § 6-2.5-5-27, since Taxpayer was hauling its own chips. The agreement states that timber is "purchased." Taxpayer and the landowner agree to a percentage of the paper mill price.

With that background in mind, the Department will now re-examine the issue. The Department notes that the rules of statutory construction require that exemption statutes be strictly construed against the Taxpayer. Indiana Dep't of State Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). Taxpayer is arguing that it is entitled to the public transportation exemption, thus Taxpayer must show that it meets the definition of public transportation. 45 IAC 2.2-5-61(b) defines Public Transportation as follows:

> (b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.
>
> (Emphasis added)

In its rehearing letter Taxpayer states that "[t]here is no pre-agreed upon price" and "[n]o money ever changes hands until after the chips have reached the mill." And as Taxpayer has previously stated, Taxpayer and landowner(s) agree to a percentage split; once the chips arrive at the mill "the money is split on the agreed upon percentages." The "Lease Agreement" states in pertinent parts:

> That in consideration of the mutual covenants and agreements to be kept and performed on the part of said parties hereto, respectively as herein stated, the said party of the first does hereby covenant and agree that it

shall: pay ___[percent] to first party and ___[percent] to second party on all veneer timber, ___[percent] to first party and ____[percent] to second party on all grade timber, and ___[percent] to first party and ___[percent] to second party on all pallet timber. Chip wood will be paid at $___per ton. Fuel wood will be paid at $___ per ton.

(Emphasis added)

And further (in pertinent part):

And said second part covenants and agrees that it shall: First party will carry the state required liability insurance and workmen's compensation insurance. Second party will allow first party to cut, timber, and haul all timber from job location. That said all timber that is purchased is free of all liens and/or mortgages. First Party will not be held liable and/or responsible for any liens and/or mortgages on said timber. Second party is responsible for and held liable for all land surveys pertaining to any and all property lines.

(Emphasis added)

Taxpayer bears the burden of proof under IC § 6-8.1-5-1(c); and exemption statutes are strictly construed against Taxpayer. The "Lease Agreement" mentions "haul[ing]," but it does not do so in terms of public transportation for consideration ("will allow...."). What the "Lease Agreement" does state is that percentages are to be paid for various woods, and that chip wood and fuel wood are "$__ per ton." It also states "[t]hat said all timber that is purchased is free of all liens and/or mortgages." (Emphasis added). Thus from facts provided, the Department again finds that Taxpayer acquires (or acquires a percentage interest) in the wood chips. Taxpayer's protest is denied.

Manufacturing Exemption:

Taxpayer also makes an argument regarding the issue of crushed stone and rock. Taxpayer argues that the initial LOF was incorrect regarding whether or not the crushed stone and rock is left at a job location. As stated in the prior LOF, Taxpayer argued that the crushed stone and rock is exempt since "[t]his material is required for the Chipper and other equipment to be set on to operate. Without it, the Chipper would not be able to operate." Taxpayer argued that the materials are "part of the manufacturing process and should not be subject to the sales tax." The Department found in the LOF that the crushed stone and rock was not exempt. The LOF stated:

Taxpayer asserts that the six items listed for crushed stone and rock meet this standard and qualify for the exemption. The Department notes that 45 IAC 2.2-5-8(c)(2)(E) states, as an example, that "A work bench used in conjunction with a work station or which supports production machinery within the production process" is exempt. At the hearing, Taxpayer indicated that the crushed stone is left/remains at the location after the portable chipper is used. In the present case, the crushed stone is not a piece of equipment, and thus it is dissimilar to the work bench example.

Taxpayer asserted at the rehearing that the crushed stone and rock is not left at the location, that the crushed stone and rock is taken with Taxpayer after its use for re-use. In its rehearing request letter Taxpayer states:

If at all possible the rock is removed when the process is completed and taken to the next location. Sometimes the rock is pushed so far down into the ground that this is not possible but because of the cost of the rock, every effort is made to salvage as much as possible for the next job. I would think that this would have to be considered part of the manufacturing process, because without the rock the chipper could not operate.

(Emphasis added)

Taxpayer after the rehearing also provided the following letter to the Department:

[Taxpayer] purchases crushed stone for the purpose of setting our portable chipper and portable grinder so that they may have a stable foundation to set up on. If at all possible, we will drag the crushed stone, load and try to relocate the crushed stone to another job location.

The Department held in the previous LOF that the "crushed stone is not a piece of equipment" and found that it is "dissimilar to the work bench example." The Department again finds that the crushed stone is dissimilar to the work bench example found in 45 IAC 2.2-5-8(c)(2)(E). As can be seen above, Taxpayer cannot always remove the crushed stone ("If at all possible the rock is removed... [,]" "[s]ometimes the rock is pushed so far down into the ground that this is not possible... [,]" "try to relocate...."). The crushed stone is not part of the wood chipper. The crushed stone is not used in conjunction with the wood chipper the way a work bench is used in conjunction with a work station in the example from 45 IAC 2.2-5-8(c)(2)(E). Additionally, the Department notes that Taxpayer has not established that turning wood into chips is manufacturing, thus Taxpayer has not shown that it comes within the scope of the manufacturing exemptions.

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty and Interest.

DISCUSSION

Taxpayer did not raise any new arguments relating to the imposition of the negligence penalty and the assessment of interest. Taxpayer recapitulated its previous argument that Taxpayer relied upon the advice of a DOT employee and thus the negligence penalty should be waived. Taxpayer asserts that "the Indiana Department of Revenue should assume responsibility for giving taxpayer the wrong advice." The Department did not give

Taxpayer the wrong advice– an Indiana DOT employee is not a Department of Revenue employee. They are different agencies. As the Department stated in the prior LOF, under 45 IAC 15-3-2(d)(1) Taxpayer should have asked the Department for a written ruling regarding any state tax issues. Taxpayer did not seek a written ruling under 45 IAC 15-3-2(d)(1), thus Taxpayer did not establish that the assessment arose due to reasonable cause and not due to negligence (See 45 IAC 15-11-2(c)). Taxpayer's protest is denied.

FINDING

Taxpayer's protest is denied.

SUMMARY

In summary, Taxpayer's protests of the sales/use tax, penalty, and interest assessments are denied.

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